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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>VERNON ROBERT WALKER,<br>Defendant and Appellant. | E038397<br>(Super.Ct.No. FMB 006290)<br>OPINION |

APPEAL from the Superior Court of San Bernardino County. James C. McGuire, Judge. Affirmed with directions.

Kimberly J. Grove, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry Carlton, Supervising Deputy Attorney General, and Christopher P. Beesley, Deputy Attorney General, for Plaintiff and Respondent.

## 1. Introduction[1]

Defendant Vernon Robert Walker and his accomplice, Demetrius McClendon,[2] killed two fellow Marines for 10 pounds of marijuana and torched the victims' car containing their bodies. A jury convicted defendant of two counts of first degree murder and one count of arson, with findings of special circumstances and a firearm enhancement. The court sentenced defendant to two consecutive terms of life without possibility of parole, plus an additional consecutive three years for arson and 10 years under section 12022.53, subdivision (b). The court also imposed two fines of $10,000 each under sections 1202.4 and 1202.45.

Defendant appeals, claiming the trial court erred because section 12022.53, subdivision (j), precluded the court from imposing a sentence for firearm enhancement when he was sentenced to a greater punishment for the underlying murders. As defendant acknowledges that issue was recently decided against him in *People v. Shabazz* (2006) 38 Cal.4th 55, 66-70. Defendant also challenges the $10,000 parole revocation fine under section 1202.45, which the People agree should be stricken. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1184-1186.)

Defendant's remaining issue is that he was sentenced separately on the arson count in violation of section 654. The People also assert an argument that the court should have

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[1] All statutory references are to the Penal Code.

[2] McClendon was tried separately and his appeal was reviewed by this court in E037706.

imposed an indeterminate sentence of 25 years to life under section 12022.53, subdivision (d), instead of the determinate 10-year term under section 12022.53, subdivision (b).

We reject both defendant's argument and the People's argument. We order the judgment modified by striking the parole revocation fine. Otherwise, we affirm.

2. Factual and Procedural Background

Defendant, McClendon, and the two victims, Angel Wathen and Julio Vargas, were all Marines stationed in Twentynine Palms and involved in drug dealing.

In the early morning hours of November 2, 2003, the police had been called to a location in the desert near Twentynine Palms where Wathen's car had been incinerated with two human bodies inside. The bodies were later identified as Wathen and Vargas. Both victims had died from shotgun wounds. In the car were a loaded handgun magazine, a cartridge case and a bullet, as well as a broken pair of eyeglasses and Vargas's dog tags. Tire tracks and footprints were found in the area.

Separately, that same morning, the police located a second grisly scene in Rancho Cucamonga. Near a dumpster, the police found blood and human tissue, including most of a human brain, shattered glass, spent bullets, an eyeglass earpiece, and bloody shoeprints and tire tracks. It appeared a person had been dragged across the concrete, causing his brain to detach from the skull. The brain belonged to Vargas.

Defendant told another fellow Marine, Jon Yoder, that he and McClendon had killed two Marines as part of a plan to obtain drugs or money. When McClendon lured the two victims to a prearranged site where defendant was hiding, defendant shot the two

men. Defendant and McClendon drove the bodies back to Twentynine Palms and set fire to the vehicle.[3]

When defendant was arrested, he had boots matching the shoeprints found in Rancho Cucamonga. Defendant's boots and a pair of bloody pants displayed bloodstains matching Vargas's DNA. Cell phone records documented 10 calls between defendant and Vargas on the night of November 1, 2003. The police found a .22-caliber pistol in defendant's car.

Similar physical evidence, including DNA, shoe patterns, and fire starting materials, also implicated McClendon.

3. Section 654

Defendant contends a consecutive three-year sentence for arson (to be served after his two consecutive life terms) was improper under section 654 because the murders and arson were committed with a single objective during a continuous course of conduct. California courts have repeatedly said about section 654: "The focus of this rule is whether the defendant acted pursuant to a single intent and objective. (*People v. Perez* (1979) 23 Cal.3d 545, 551-552.) The resolution of this question is one of fact and the trial court's finding will be upheld on appeal if it is supported by substantial evidence. [Citations.]" (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.)

Here the trial court found: ". . . the crime and their objectives were predominantly independent of each other and involved – as to Counts 1 and 2 verses [*sic*] Count 3 . . .

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[3] In the probation report, defendant claimed he suffered a flashback to Iraqi

*[footnote continued on next page]*

the crimes did involve separate acts of violence. Again Counts 1 and 2 . . . the crimes were committed at different times and separate places rather than being committed so closely in time and place as to indicate a single period of . . . abhorant [*sic*] behavior. Several hours elapsed between the murders and the arson." During the lapsed time, as noted by the court, defendant drove more than a hundred miles with the bloody corpses as his passengers, before subjecting them to immolation.

Substantial evidence supports the trial court's express finding that defendant acted with more than one objective, murder followed by desecration. Nevertheless, a course of conduct, directed toward one objective but divisible in time, may give rise to multiple violations and separate punishments: "For example, in *People v. Beamon* [(1973) 8 Cal.3d 625, 639], the Supreme Court stated that protection against multiple punishment under section 654 applies to 'a course of conduct deemed to be *indivisible in time*.' . . . The court added in a footnote: 'It seems clear that a course of conduct *divisible in time*, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' (*People v. Beamon*, *supra*, fn. 11, italics added.) Thus, a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted 'one indivisible course of conduct' for purposes of section 654. If the offenses were committed on different occasions, they may be punished separately." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.) The murders and the arson were properly punished separately.

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*[footnote continued from previous page]*
patrols and killed the victims, believing they were Iraqi terrorists.

4. Section 12022.53, subdivisions (b) and (d)

The People contend the court should have imposed an indeterminate sentence of 25 years to life under section 12022.53, subdivision (d), instead of the determinate 10-year term under section 12022.53, subdivision (b).

Subdivision (b) states: ". . . any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years."

Subdivision (d) states: ". . . any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

The first amended information charged a violation of subdivision (d). The prosecutor argued there was a violation of subdivision (d) because defendant caused two deaths. The court instructed the jury according to CALJIC No. 17.19.5, which is based partly on subdivision (d). Using a single verdict form, the jury found "the Special Allegation that the defendant . . . did personally and intentionally use a firearm to be TRUE." The form omitted language from subdivision (d) about causing great bodily injury or death. The court's minutes reference subdivision (d), not subdivision (b), but the trial court expressly imposed the sentence under subdivision (b).

The People argue the jury made its finding under subdivision (d), not subdivision (b), and the proper sentence is an indeterminate 25-year term, not the determinate 10-year term. Defendant contends there was no express jury finding, as required by section 1170.1, subdivision (e), which would have authorized punishment under subdivision (d).

On this issue, we agree with defendant. The trial court could have corrected the error. (*People v. Trotter* (1992) 7 Cal.App.4th 363, 369-370.) The appellate court may not. This is not a case involving an "unauthorized sentence," like in *People v. Scott* (1994) 9 Cal.4th 331, 354.) Where the prosecution inadvertently fails to take the proper steps to secure a jury verdict on an enhancement allegation, courts have held the matter may not be corrected on defendant's appeal. (*People v. Najera* (1972) 8 Cal.3d 504, 512; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1282; *People v. Anderson* (1975) 50 Cal.App.3d 325, 334.)

5. Disposition

The judgment is affirmed with directions. On remand, the trial court is ordered to prepare a modified abstract of judgment, striking the parole revocation fine.

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s/Gaut
J.

I concur:

s/King
J.

RAMIREZ, P.J.

I respectfully dissent from the majority's affirmation of the 10-year sentence for the firearm enhancement attached to the first murder. (The sentencing court struck the term for the identical enhancement in connection with the second murder.)

The charging document alleged, as to both murders, that Walker "personally and intentionally discharged a firearm . . . which proximately caused . . . death to [the victims] . . . ." The jury instruction on this allegation, CALJIC No. 17.19.5, provided, "It is alleged [in connection with the murders] that [Walker] intentionally and personally discharged a firearm [and proximately] caused death to a person during the commission of the crime[s] charged. [¶] If you find [Walker] guilty of [one or more of] the crimes thus charged, you must determine whether [he] intentionally and personally discharged a firearm and [proximately] caused death to a person in the commission of those felonies. [¶] . . . [¶] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose." Unfortunately, the follow-up instruction to the foregoing read as follows: "If . . . you find [Walker] . . . guilty of the offense of [murder] . . . then . . . you must find the following allegation to be [true] or [not true]: [¶] . . . We . . . find the Special Allegation that [Walker] . . . did personally and intentionally *use a firearm* to be [true]; or; [¶] We . . . find the Special Allegation that [Walker] . . . did personally and intentionally *use a firearm* to be . . . [not true]." (Italics added.)

During argument to the jury, the prosecutor said of the firearm allegation, "[A]ccompanying [the charge of murder in Count 1] [is] . . . Penal Code section

12022.53(d), that is in regards to a firearm that [Walker] used, the intentional personal use of a firearm . . . . [¶] . . . [¶] [The] Penal Code section 12022.53(d) . . . allegation is . . . defined in California Jury Instruction 17.19.5 . . . . [Y]ou'll see . . . [at the bottom of the instruction that Walker] 'personally and intentionally discharged a firearm.' That's one of the elements that I have to prove. And that that [ discharge] . . . proximately caused the death. [¶] [I]t's clear that based on all of the evidence . . . that [Walker] did personally and intentionally discharge a firearm. And, . . . that shot, caused [the first victim's] death . . . . [Y]ou're going to be asked . . . to decide whether it is true or not true. [¶] . . . [¶] [As to the firearms allegation in connection with the second murder, Walker] personally and intentionally discharged a firearm which proximately caused the death. Well, the firearm did cause the death. It was discharged. And [Walker] was the one who did it. He did it himself . . . . He was the shooter. So this allegation . . . is also true."

The second jury instruction quoted above resulted in the jurors receiving the following preprinted finding form, which they signed, "We . . . find the Special Allegation that [Walker] . . . did personally and intentionally *use a firearm* to be true." (Italics added.) The probation report also stated that the finding was pursuant to Penal Code section 12022.53, subdivision (b), not (d), and thus, the trial court imposed the 10-year term provided for in subdivision (b).

The first issue is what governs—the charging document, instructions and argument of the prosecutor or the wording of the preprinted finding form signed by the jury? According to *Trotter*, cited with apparent approval by the majority (maj. opn., *ante*

at p. 7), the former does. In *Trotter*, the charging document alleged the defendant personally used a firearm pursuant to Penal Code section 12022.5. (*People v. Trotter* (1992) 7 Cal.App.4th 363, 369.) The jurors were instructed pursuant to that section, that to make a true finding as to the allegation, they had to conclude that the defendant personally used a firearm. (*Ibid.*) Although the preprinted finding form referenced the correct Penal Code section, it stated that the jury had found that the defendant was "armed with a firearm." (*Ibid*.) The error was caught after the jury was discharged, but before the defendant was sentenced. (*Ibid*.) Over defense objection, the trial court corrected it by striking from the finding form the word "armed" and substituting, in its place, the words, "personally used." (*Ibid*.) Division Three of this court concluded that the jury signing the incorrect finding form was "a textbook example of clerical error" which the trial court was empowered to correct in the manner it did. (*Id*. at p. 370) Although the majority cites *Trotter* as authority for the ability of the trial court here to have changed the finding form to show that the jury found true the allegation that Walker intentionally discharged a firearm proximately causing death (maj. opn., *ante*, at p. 7), it does not state how *Trotter* is distinguishable from this case, such that we may not remand this matter to the trial court to permit it to amend the jury's finding. Rather, the majority declare that we may not correct it ourselves, citing *People v. Najera* (1972) 8 Cal.3d 504, 512, *People v. Salas* (2001) 89 Cal.App.4th 1275, 1282-1283 and *People v. Anderson* (1975) 50 Cal.App.3d 325, 334, because the People should be deemed to have waived application of the enhancement.

In *Najera*, it was alleged that the defendant was armed with a gun and the jury so found. (*People v. Najera*, *supra*, 8 Cal.3d at p. 506.) The California Supreme Court concluded that "by reason of the People's *failure to request jury instructions* covering [the defendant's use of a gun], the People should be deemed to have waived the application of [the] section" which provides an enhancement for gun use; therefore, the matter could not be remanded for the appropriate finding. (*Id.* at pp. 509, 512., italics added.) The court reasoned that a defendant could not be subjected to piecemeal jury litigation of issues, i.e., a second trial on the enhancement for which the jury was not instructed during the first trial. (*Id.* at p. 512.)

In *Salas*, it was alleged that a principal personally discharged and used a firearm, pursuant to Penal Code sections 12022.53, subdivisions (b), (c), (d) and (e)(1) and 12022.5, subdivision (a)(1). (*People v. Salas, supra,* 89 Cal.App.4th at 1278, 1279.) As in *Najera*, "The jury was never instructed that defendant must personally use a firearm in order for any enhancement to be returned. [¶] The jurors never found defendant personally used a firearm." (Salas at p. 1279, italics added.) Rather, they found that a principal personally discharged and personally used a firearm, pursuant to those sections. (*Id.*) The appellate court held that the defendant was not subject to the minimum parole eligibility date Penal Code section 186.22, subdivision (b)(5) provided for one who personally used a gun and the matter could not be remanded to the trial court for the appropriate finding because the People waived the matter, as they had in *Najera*. (Salas at pp. 1282-1283) Here, in contrast to *Najera* and *Salas*, the proper instructions triggering the application of subdivision (d) had been given.

*Anderson* involved a court trial. (*People v. Anderson, supra,* 50 Cal.App.3d at p. 327.) Although the defendant had been charged with using a firearm, the trial court found only that he was armed. (*Id.* at pp.327-328.) The *Anderson* court disagreed with another appellate opinion which had permitted remand of a court trial to determine if a defendant used a firearm when he had been charged only with being armed and the trial court had so found. (*Id.* at p. 333) Pointing to the holding in *Najera*, the *Anderson* court concluded it would be unfair to permit remand in trial court cases, but not in jury cases. (*Anderson* at p. 334) *Anderson* merely applied *Najera's* holding that where there is an absence of instructions on the enhancement, remand for the appropriate finding is not proper. Again, such was not the case here.

Neither *Najera*, *Salas* nor *Anderson* stand for the proposition for which the majority cites them, i.e., that when the defendant is charged with an enhancement allegation and the jury is instructed as to it, if the preprinted finding form is in the language of another enhancement allegation, remand for correction of the error or correction by the appellate court is not appropriate.

As to our power to correct this clerical error, *People v. Chambers* (2002) 104 Cal.App.4th 1047 is instructive. In *Chambers*, the defendant was charged with personally using a firearm pursuant to Penal Code section 12022.53, subdivision (b). Following a trial by the court, it found the defendant guilty, but failed to make any enhancement finding whatsoever. However, at sentencing, it imposed a 10-year term pursuant to the subdivision. The appellate court affirmed the trial court's imposition of the 10-year term, concluding that this was an implied finding of the truth of the

allegation, thus fulfilling Penal Code section12022.53, subdivision (j)'s requirement that the allegation be "found by the trier of fact."[1] More to the point here, *Chambers* said of what should be done, "[A] remand for an express finding would be an exaltation of form over substance." (*Chambers* at p. 1051.) Although *Chambers* acknowledged, as does the majority, the need for a prosecutor to not be "asleep at the wheel," nevertheless it recognized its power to "correct the error" of the missing express finding by affirming the sentence and not remanding the matter to the trial court for an express finding. It should be noted that the term for the enhancement in *Chambers* was much lengthier than that for the charged offenses. Still, the correction was deemed to be appropriate. Here, the enhancement term was potentially substantially less than the life without possibility of parole sentence Walker received for the murders. Under these circumstances, it is even more understandable that the prosecutor neglected to ensure that the jury had the proper finding form. If, as *Trotter* holds, and the majority appears to agree, this is a clerical error, there is no reason why this court cannot correct it. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

[1] In support, the *Chambers* court cited *People v. Clair* (1992) 2 Cal.4th 629, in which the California Supreme Court found that a trial court's imposition of a term for a prior conviction served as an implied finding by the court of the truth of the allegation of the prior, despite its failure to make an express finding on the allegation.

Based on the foregoing, I believe we should either remand the matter to the trial court so it may correct the jury's finding and impose the 25 to life term, or do it ourselves.

s/Ramirez
P.J.